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No._____

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR HUGO CARDONA-LOPEZ,
Petitioner,
v.
ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a second conviction for simple drug possession under State law is a felony under the Controlled Substance Act (CSA), because it could have been prosecuted as a recidivist offense under 21 U.S.C. § 844(a).

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OPINIONS BELOW

The Order and judgment of the Fifth Circuit Court of Appeals (App. A, infra, 2a). The Opinion of Board Of Immigration Appeals (BIA), (App. B, infra, 4a). The Opinion of the Immigration Judge (App. C, infra, 11a).

JURISDICTION

The Order and judgment of the Fifth Circuit Court of Appeals was entered on August 4, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, as well as 28 U.S.C. § 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provision of the U.S. CONST. art. I § 8, is reproduced at App. D, infra, 16a.

The relevant provision of the U.S. CONST. art. III §§ 1 and 2, is reproduced at App. D, infra, 16a.

The relevant provisions of the U.S. CONST. amends. V, VI, VII, VIII, XIV, are reproduced at App. D, infra, 16a-17a.

The relevant provision of 8 U.S.C. § 1101 (a)(43)(B), is reproduced at App. D, infra, 18a.

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The relevant provision of 21 U.S.C. § 844(a), is reproduced at App. D, infra, 18a.

The relevant provision of 21 U.S.C. § 851 (a)(1), is reproduced at App. D, infra, 19a.

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The relevant provision of 28 U.S.C. §2101 (c), is reproduced at App. D, infra, 20a.

The relevant provision of 28 U.S.C. §1254(1), is reproduced at App. D, infra, 20a.

The relevant provisions of Tex. Penal Code §§12.42(a) (1), 12.43(a), are reproduced at App. D, infra, 20a.

The relevant provision of Tex. Crim. Proc. Code art. 42.12 § 5, is reproduced at App. D, infra, 21a.

STATEMENT OF THE CASE

The Immigration Judge in Houston, Texas, on January 8, 2009, decided that in the Fifth Circuit a second conviction for simple possession of a controlled substance is an aggravated felony and thereby denied petitioner, a legal permanent resident (LPR), an opportunity to seek cancellation of removal. The Supreme Court's decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006) was deemed to not control this case and the Fifth circuit's precedent applied to deny any relief to Cardona-Lopez.

On May 4, 2009, the Board of Immigration Appeals after considering a timely appeal decided to dismiss the case and sustain the Immigration Judge's decision.

On August 4, 2009, the Fifth circuit after a timely appeal and petition for stay of deportation, by Petitioner, decided to deny the stay of deportation and granted the government's request for summary affirmance, thereby securing the final order of removal issued by the Immigration Judge.

Cardona-Lopez is a Legal Permanent Resident (LPR) since July 1999. On June 27, 2007, Petitioner was convicted upon entering a plea of guilty in the 339th District Court, Harris County, Texas, to a charge of unlawful possession of cocaine, less than one gram, and sentenced to 30 days confinement in the county jail. On September 29, 2008, the respondent was convicted upon a plea guilty, in the 339th District Court, Harris County, Texas, to a charge of unlawful possession of cocaine, less than one gram, resulting in the trial court's entry of an order deferring adjudication of his guilt and placing him on probation for a period of two years. *See* TEX. CRIM. PROC. CODE ANN. ART. 42.12 § 5 (Vernon 2006). The offense underlying this September 29, 2008 conviction was committed on September 27, 2008.

There is a conflict among circuits as to whether a second conviction for simple possession of a controlled substance constitutes an aggravated felony for which an LPR can be removed without the possibility of cancellation of removal under 8 U.S.C. 1229b (a). The source of disagreement stems from the *Lopez v. Gonzales*, 549 U.S. 47 (2006) decision. The Fifth and Seventh Circuits propose that *Lopez* advances the proposition that, on a theory known as the

"hypothetical federal felony", an individual may be constitutionally tried in an immigration Court and found to have committed a felony, not because a federal Court convicted him but because he "could have been" convicted of such a felony. The First, Second, Third and Sixth Circuits propose that *Lopez* advances the idea that a conviction in state court for a controlled substance must be a felony under the Controlled Substance Act (CSA) in order to qualify as a felony for removal proceedings. Under the theory of these circuits a second conviction for simple possession of a controlled substance is not a felony simply because it could have been prosecuted as such under the recidivist provisions of the CSA. The theory proposed by the circuit courts that hold a second conviction is not a felony or an aggravated felony under 8 U.S.C. § 1101 (a)(43)(B) is correct because no constitutional dilemma follows. The theory embraced by the Fifth Circuit causes Constitutional questions such as; due process concerns, trial by jury violations, right to confront witnesses, equal protection, and cruel and unusual punishment issues.

REASONS FOR GRANTING THE PETITION

A second conviction for simple drug possession under State law is not a felony under

the Controlled Substance Act simply because it could have been prosecuted as a recidivist offense under 21 U.S.C. § 844 (a).[1] While such statutory provision does provide that under certain circumstances an individual may be sentenced up to two years for what would have otherwise been a misdemeanor, it does so with some essential protections. The CSA provides in 21 U.S.C. § 851 for proceedings to establish the existence of a prior conviction.[2] Under the

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[1] 21 U.S.C. § 844 (a) reads in pertinent part as follows: "Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 125 days but not more than 2 years,..."

[2] 21 U.S.C. § 851 (a)(1) provides in part that "[n]o person who stands convicted of an offense under this part shall be sentence to increase punishment by reason of one or more prior convictions, unless before trial, or before entry of plea of guilty, the United States attorney files and information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." And it further states in 21 U.S.C. § 851 (b) that "the Court shall after conviction but before pronouncement of sentence inquire of the person...whether he affirms or denies that he has been previously convicted..." and then under 21 U.S.C. § 851 (c)(1) it is written that "[i]f the person denies any

language of 21 U.S.C. § 851 it is not mandatory that the Assistant U.S. Attorney charge the defendant under this statute even if it could have. What the Fifth and Seventh circuit propose could give way to LPRs being removed as aggravated felons even when they were not convicted in a Federal prosecution under such statute merely because they could have been. To be more specific, an LPR who is prosecuted not under State but rather Federal law, would still be removable as an aggravated felon without relief under the cancellation of removal provisions just because an Immigration Judge under the territory of the Fifth or Seventh Circuit would still be, theoretically, able to possibly prosecute the LPR under the Hypothetical Felony Conviction concept. In the case of Cardona-Lopez, the procedure established by 21 U.S.C. § 851 was not followed, since in his convictions there was no reference to any recidivist provision. Due process of law would require that at a minimum the provisions

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allegation of the information of prior conviction, or claims any conviction alleged is invalid, he shall file a written response to the information... The court shall hold a hearing...the United States shall have the burden of proof beyond reasonable doubt on any issue of fact." A person may even present a claim that a prior conviction was obtained in violation of the Constitution. See 21 U.S.C. § 851 (c)(2).

under 21 U.S.C. § 851 be followed. In this case Cardona-Lopez was not convicted under the Texas recidivist provision. The offense for which Cardona-Lopez was convicted did not even merit prison time since he was sentenced to two years deferred adjudication. The crime would have been a misdemeanor under the CSA. (See 21 U.S.C. § 844(a) and 18 U.S.C. § 924(c)(2) as well as 8 U.S.C. § 1101 (a)(43)(B), none of which would define Victor Hugo Cardona-Lopez's convictions as aggravated felonies for removal proceedings). The State of Texas did not provide Cardona-Lopez with notice of intent to use his prior conviction and therefore did not give him an opportunity to have a hearing before the court and to challenge his prior conviction as required by 21 U.S.C. § 851. The fifth circuit felt obliged to follow its own precedent in *United States v. Sanchez-Villalobos* while deciding *Carachuri-Rosendo v. Holder* since one panel of the fifth circuit cannot overrule another.[3] The trouble with this position is that in essence it leaves the issue being presented today as already decided and therefore it is an exercise in futility to make this argument before the Fifth

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[3] *States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2006); *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2005).

Circuit.[4] *Carachuri-Rosendo v. Holder* has already decided that even when an individual has not been prosecuted under the State's recidivist law he may nonetheless be hypothetically convicted of an aggravated felony under the CSA and therefore, if he is an alien, be removed from this country without any possible relief. In *Lopez v. Gonzales*, 549 U.S. 47 (2006) the Court held "that a State offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law."[5] *Lopez* dealt with an individual who had committed and plead guilty to aiding and abating another person's possession of cocaine and was sentenced to five years in prison. *Lopez* did not deal with the issue of recidivism. The dissenting opinion of the *Lopez* court states:

> "the Court admits that its reading will subject an alien defendant convicted of a state misdemeanor to deportation if his

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[4] For the reason that it seemed that this argument was futile, since one panel may not overrule another in the fifth circuit, and this case asked the fifth circuit precisely to overrule a decision by a prior panel, it would have been requested that this case be heard in banc. The request was never made since the Fifth Circuit ruled and issued an order prior to the deadline for Petitioner to file its Brief.

[5] *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006).

> conduct was punishable as a felony under the CSA. Accordingly, even if never convicted of an actual felony, an alien defendant becomes eligible for deportation based on a hypothetical federal prosecution."[6]

The concern of the dissenting opinion seems to have become a reality. However, the majority opinion of the *Lopez* court does not give unlimited power to Immigration Judges so that they may in turn hypothetically prosecute LPRs or any other aliens under the territory of the Fifth and Seventh Circuits. The Supreme Court, as defined under U.S. CONST. art. III § 2, has judicial power "extended to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;..." The U.S. Supreme Court is a branch of government with limited entrustment under the Constitution. The power of the U.S. Supreme Court is exclusively judicial and it does not extend to creating powers not given by the constitution to itself or any other branch of government. *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803) confirmed the limited power of the Supreme Court by taking the additional step of

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[6] *Lopez v. Gonzales*, 549 U.S. 47, 67 (2006).

declaring that it was not permissible for Congress to add or change the original or appellate jurisdiction of the Supreme Court. In *Marbury v. Madison* the U.S. Supreme Court further stated that:

> "[i]t is emphatically the province and duty of the judicial department to say what the law is.... So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules govern the case.... If, then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."[7]

In essence *Marbury v. Madison* stands for the proposition that the U.S. Constitution is the paramount law of the Nation and that if a Court is confronted with a case in which both the U.S.

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[7] *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 177 (1803).

Constitution and an Ordinary Act of congress applies it must decide the case on the basis of the constitution. In this case the CSA applies to Cardona-Lopez's situation as well as the U.S. Constitution. While there is a conflict among the Circuits of the Nation with regards to the issue presented here, the main reason why the U.S. Supreme Court should grant Certiorari is to resolve the conflict that compromises the integrity of the U.S. Constitution.

Throughout the country many cases have reached the Courts of Appeals concerning whether individuals that have been convicted in State Courts more than once of a controlled substance violation can be considered aggravated felons for immigration purposes and if they are LPRs they would be left without a remedy to removal. The Fifth Circuit has taken the position that an LPR who has been convicted more than once of simple possession of a controlled substance in violation of state law will be subject to removal as an aggravated felon and thereby no remedy is available to him. See *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2006). Furthermore, in *United States v. Cepeda-Rios*, 530 F.3d 33 (5th Cir. 2008) the court reaffirms its prior holding in *Sanchèz-Villalobos*. Most recently, in *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009) the Fifth Circuit recognizes that federal not state law is determinative of whether an

individual has committed a felony punishable under the Controlled Substance Act but then goes on to rule than under the hypothetical approach because Carachuri-Rosendo could have been prosecuted under the recidivist statute 21 U.S.C. 844 (a) he in essence committed an aggravated felony for which no relief from removal was available. Furthermore, the Fifth Circuit states in *Carachuri-Rosendo* that:

> "[T]he Supreme Court in *Lopez* goes beyond the categorical approach. *Lopez*, 549 U.S. at 60...(emphasis added) (ruling that if the conduct proscribed by state offense could have been prosecuted as a felony under the CSA, then the state conviction qualifies as an aggravated felony under 8 U.S. C. § 1101(a)(43)(B); see *Pacheco-Diaz*, 513-F.3d at 779; *Rashid v. Mukasey*, 531 F.3d 438, 443 (6th Cir.2008) ('The *Lopez* Court...embraced the hypothetical federal-felony approach.'). *Lopez* did not hold that courts or immigration officials should look to the alien's actual conduct as reflected in the record of conviction."[8]

The Fifth Circuit seems to be addressing the concerns of the dissenting opinion in the *Lopez* case. In so doing, the Fifth Circuit takes the *Lopez* ruling and turns it into a machinery that

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[8] *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 267 (5th Cir. 2009).

can be set in place to give the immigration judge the power to become a District Court criminal judge and conduct a trial in which the Respondent can be found guilty without notice or a jury trial or even the possibility of confronting witnesses against him. The United States Constitution requires that criminal trials be conducted in a very specific fashion.[9] Just as Congress and the Executive and the Fifth Circuit are subject to and even creatures of the United States Constitution so is the Supreme Court of the United States. It is not logical that the Supreme Court of the United States would have created a rule that is offensive to the principles promulgated by our founding fathers and memorialized in the United States Constitution. The ***Lopez*** court did not throw out the window the due process requirement of the Fifth Amendment. The ***Lopez*** court did not ignore the requirements of a fair trial and impartial jury as well as the confrontation of

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[9] U.S. Constitution Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,...nor be deprived of life, liberty, or property, without due process of law..." and U.S. Constitution Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ...to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence."

witnesses required by the Sixth Amendment. In the *Carachuri-Rosendo* case, the court states that "one panel of this court may not overrule another"[10], however, maintaining the precedential value system, that is the doctrine of *stare decisis*, is not benefited in the most minimal way when the precedent that is being followed is unconstitutional.[11]

Article 1 §8 provides that "Congress shall have power to....establish an uniform Rule of Naturalization, a uniform Laws on the subject of bankruptcies throughout the United States;...". This power given to Congress by the Constitution is not without limits. In *United States v. Carolene Products Co.*, 304 U.S. 144

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[10] *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 267 (5th Cir. 2005).

[11] The precedent established by *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) was that a person of color was not even a person for purposes of the United States Constitution. Sadly, it took a Civil War and two Amendments (Thirteenth and Fourteenth), to correct this huge mistake of the Supreme Court of the time. So, sometimes precedential value of opinions should not override the Constitution. If *Brown v. Board of Education*, 347 U.S. 483 (1954) had followed the precedential value of the erroneously decided case of *Plessy v. Ferguson*, 163 U.S. 537 (1896) then today, we would still have the separate but equal doctrine and many would have not been able to go to a law school where they could have had the benefit of a diverse community. Setting precedent is important but not as important as setting the right constitutional precedent.

(1938) Justice Stone writes in footnote number four that:

> "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution,...It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation...whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[12]

There is a constant undeniable danger that if any branch of government is given plenary power in any one area such branch will inevitably overreach its breath into what is not permissible. If Congress is given an unchecked

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[12] *United States v. Carolene Products Co.*, 304 U.S. 144, 152(1938).

power over immigration matters, it is not a question of if but rather when will it begin exercising prejudice against discrete and insular minorities such as the one Cardona-Lopez belongs to.[13] The Fifth Amendment and the Fourteenth Amendment give Cardona-Lopez due process protection as well as equal protection of the laws. If the immigration law created by Congress in its 1996 Amendments to the INA is interpreted one way in the Fifth Circuit and another in the Second Circuit or the Seventh or the Third Circuit, Congress' responsibility to create "an uniform Rule of Naturalization" has not met its constitutional mandate. Ultimately the Supreme Court of the United States may rule against our position, but it is imperative, for constitutional purposes, that we have an uniform Rule of Naturalization.

The United States Court of Appeals for the Fifth Circuit has determined in *Carachuri-Rosendo v. Holder*, 570 F.3d. 263 (5th Cir. 2009), that a second state possession offense that could have been punished as a felony under federal law qualifies as an aggravated felony under 8 U.S.C. § 1101 (a)(43)(B). The Court also determined that the alternative holding in *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), to the effect that a second

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[13] Victor Hugo Cardona-Lopez belongs to a discrete and insular minority of individuals who have been accepted as legal permanent residents but have no right to vote since they are not citizens yet.

state conviction could be punishable under the CSA as a felony by virtue of the recidivism provision, was not overruled by *Lopez v. Gonzales*, 549 U.S. 47 (2006).[14] The effect of the Court's interpretation is that an LPR can be stripped of his legal status in the U.S. for having been convicted of a second possession of a controlled substance under State law without ever being tried by a jury under a recidivist statute. *Lopez v. Gonzales*, 549 U.S. 47 (2006) did in effect overrule *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005). While the *Lopez* Court did not address the issue of a second state conviction for possession of a controlled substance, it might be a stretch to suggest that the Court approved of the alternative holding in *Sanchez-Villalobos*. In the *Lopez* decision, Justice Thomas in his dissenting opinion wrote about his concern that the majority's opinion could have created an anomaly were upon an alien defendant could be

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[14] The argument that the alternative holding in *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005) was dicta is now mute since the Court determined that such ruling is the law in the fifth circuit even in the immigration context. See *Carachuri-Rosendo v. Holder*, 570 F.3d. 263 (5th Cir. 2009). It is dangerous to hold that dicta can be binding law. Furthermore, it makes common sense that there is a difference in applying a concept in the context of sentencing as opposed to removal proceedings. While an Alien can be found to have been an aggravated felon for the purposes of the Sentencing guidelines it does not automatically follow that he would be an aggravated felon for removal proceedings.

deported even if never convicted of an actual felony based on a hypothetical prosecution. See *Lopez v. Gonzales*, 549 U.S. 47, at 67 (2006). However, the majority's opinion did not authorize immigration judges to hypothetically convicted aliens in removal proceedings. Such interpretation would be inconsistent with the U.S. CONST. amend. VI, which reads in part that:

> "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the States and District wherein the crime shall have been committed,...and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

If *Lopez* is interpreted as authorizing a hypothetical federal conviction than Cardona-Lopez's right to; a jury trial, confront witnesses, and assistance of counsel pursuant to the Sixth Amendment of the U.S. Constitution would be obliterated. In *Chewning v. Cunningham*, 368 U.S. 443 (1962) the Supreme Court concluded that convictions based on recidivist statutes, are complex enough to merit appointment of counsel. The sixth amendment was not followed in this case because Victor Hugo Cardona-Lopez was hypothetically tried and convicted of having

committed a federal felony without a jury or the opportunity to confront witnesses and was not even afforded the opportunity to have appointed counsel. Cardona-Lopez was of course represented by counsel at his own expense. In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) the court expressed "[u]nder our law, the alien in several respects stands on an equal footing with citizens"[15] and it further writes, as footnote 9, that:

> "[t]his Court has held that the Constitution assures him a large measure of equal economic opportunity, *Yick Wo v. Hopkins*, 118 U.S. 356...;*Truax v. Raich*, 239 U.S. 33...;he may invoke the writ of habeas corpus to protect his personal liberty, *Nishimura Ekiu v. United States*, 142 U.S. 651; in criminal proceedings against him he must be accorded the protections of the Fifth and Sixth Amendments, *Wong Wing v. United States*, 163 U.S. 228...; and, unless he is an enemy alien, his property cannot be taken without just compensation. *Russian Volunteer Fleet v. United States*, 282 U.S. 481..."[16]

The Supreme Court once again in *Galvan v. Press*, 347 U.S. 522 (1954) affirms an alien's status as a person and his equal protection of

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[15] *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 (1952).
[16] *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 (1952).

life, liberty and property under the due process clause as is afforded to a citizen. The *Galvan* Court faced a situation regarding the application of the Internal security Act of 1950 to an individual who had become part of the Communist Party after being admitted but who no longer was a communist member at the time the Act was enacted. The issue was specifically related to the ex-post facto application of the law and the *Galvan* Court ratified another long held belief that "whatever might have been said at an earlier date about the ex post facto Clause, it has been the unbroken rule of this Court that it has no application to deportation."[17] The dissenting opinions in both *Harisiades v. Shaughnessy* and *Galvan v. Press* express their beliefs that aliens are persons within the meaning of the Constitution and deserve due process protection. It is clear that the *Harisiades* and *Galvan* Courts were unanimous as far as their belief and holding that, at least aliens legally in the U.S. (LPRs), were persons under the fifth and fourteenth amendments of the U.S. Constitution and therefore due process right attached to them. The *Lopez* Court has not said that LPRs are not persons to whom due process rights do

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[17] *Galvan v. Press*, 347 U.S. 522, 531(1954). The reasoning behind the holding that the ex post facto clause has no application to deportation is based on the simple premise that deportation or removal, is a proceeding that is civil in nature. However, this proceeding that is supposedly civil in nature looks more like a criminal process, were now an immigration judge can even convict a respondent of a hypothetical federal felony.

not attach. The creation of a hypothetical felony would have due process implications and interpreting the *Lopez* decision as requiring such interpretation would be contrary to the U.S. Constitution.

Whether a second conviction for simple drug possession under state law is a felony under the Controlled Substances Act (CSA) because it could have been prosecuted as a recidivist offense under 21 U.S.C. § 844(a), is a question that has been answered by the Fifth Circuit in the affirmative. See *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), a decision which has also been presented for review to the Supreme Court as far as counsel understands. The same basic question has also been answered in the affirmative by the Seventh Circuit. See *United States v. Pacheco-Diaz*, 506 F.3d. 545 (7th Cir. 2007), however, it is interesting to note that Judge Rovner dissented and thereby the Seventh Circuit's decision is not unanimous. This question has been answered in the negative by the First Circuit, see *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006); the Second Circuit, see *Alsol v. Mukasey*, 548 F.3d 207 (2nd Cir. 2008); the Third Circuit, see *Steel v. Blackman*, 236 F.3d 130 (3rd Cir. 2001); and *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008). In essence the Circuit Courts that believe a second conviction for simple possession can be an aggravated felony and thereby deprive the LPR of the right to seek cancellation of removal

do so on the basis that *Lopez v. Gonzales*, 549 U.S. 47 (2006), stands for the proposition that a second conviction for simple possession may be hypothetically prosecuted as a felony under the CSA and therefore be an aggravated felony for removal purposes. Under this theory an individual alien would be deprived of fundamental rights under the Fifth and Sixth Amendments to the U.S. Constitution as well as the Seventh and Eighth Amendment. The individual alien would be deprived of the right to a fair trial by jury, the right to counsel, and to confront witnesses. These procedures would be so fundamentally unfair as to amount to cruel and unusual punishment. Under the theory of these Circuit Courts the Alien would not be given an opportunity to present any defense to the charges since the State would not be required to give notice about the previous conviction's use to prosecute the defendant as a recidivist. Due process of law requires that the provisions under 21 U.S.C. § 851 be followed. In this case Cardona-Lopez was not convicted under the Texas recidivist provision. It is ultimately the responsibility of the U.S. Supreme Court to ensure that the U.S. Constitution not be injured by acts offensive to its letter. Furthermore, in *Kaoru Yamataya v. Fisher* 23 S.Ct. 611 (1903) the Court Stated:

> "this court has never held, nor must we now be understood as holding, that administrative officers, when executing

the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without the opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends, not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the

principles involved in due process of law are recognized."[18]

A person is a person no matter how small.[19] The deportation of an individual based on the hypothesis that he could have been charged and convicted under the CSA of a felony irrespective of the fact that in actuality he was convicted of a misdemeanor strikes as an arbitrary application of the law in violation of due process. The United States Supreme Court did not authorized Immigration Judges to become prosecutors and judges of individuals subject to their jurisdiction. Such power is one properly held in a despotic form of government that our constitution clearly prohibits and our founding fathers thought to be repugnant. It is not permissible under our system of government to allow immigration judges to lunge criminal accusations, acting as prosecutors, indicting aliens of having hypothetically committed an act in violation of the CSA under the recidivist statutes which constitutes an aggravated felony and then, at

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[18] *Kaoru Yamataya v. Fisher* 23 S.Ct. 611, 614 (1903).

[19] In Horton Hears a Who, Horton the elephant alleges that even when the person in the tiny speck he is carrying is very small, such person is still a person and must be afforded an opportunity to live. This is a classic children's story written by Doctor Zeus, that in essence expresses a fundamental principle of American Constitutional law. Every person, irrespective of the status such individual holds in society, deserves to be treated with dignity and fairness. This principle is so fundamental we even teach it to our children.

the same time, find them deportable without ever having afforded the alien, an LPR in this case, a meaningful opportunity to defend against such criminal charges. Under the Controlled Substances Act (CSA) 21 U.S.C. § 844(a) an individual may be sentenced to more than one year if he has a prior conviction for a controlled substance under the CSA or any state. However, the same CSA provides in 21 U.S.C. § 851 proceedings to establish prior convictions. In the case of Hugo Cardona-Lopez, these procedures were not followed, since in his convictions there were no references to any recidivist provision. Due process of law would require that at a minimum the provisions under 21 U.S.C. § 851 be followed. In this case Cardona-Lopez was not convicted under the Texas recidivist provision. The offense for which Cardona-Lopez was convicted did not even merit prison time since he was sentenced to two years deferred adjudication. The crime would have been a misdemeanor under the CSA. The State of Texas did not provide Cardona-Lopez with notice of intent to use his prior conviction and therefore did not give him an opportunity to have a hearing before the court and to challenge his prior conviction as required by 21 U.S.C. § 851. On the other hand, the Circuit Courts that hold that an LPR can have cancellation of removal as a remedy, do so based on *Lopez v. Gonzales*, 549 U.S. 47 (2006), since, in their view, a hypothetical felony is not mandated to be imputed upon the second conviction for simple

possession at least in an automatic form. Counsel believes that if the State that prosecutes the offense for the second conviction of simple possession, does so under a recidivist statute with similar protections as those afforded by 21 U.S.C. § 851 then it might be a situation in which the LPR could be constitutionally deprived of the remedy of cancellation of removal. The Supreme Court has long recognized that legal permanent residents and aliens have due process rights under our Constitution, even if limited, see *Bridges v. Wixon*, 326 U.S. 135 (1945) as well as *Landon v. Plasencia* 459 U.S. 21 (1982) and *Oyler v. Boles*, 368 U.S. 448, 452-53 (1962). Furthermore, *Chewing v. Cunningham*, 368 U.S. 443 (1962) can be seen as standing for the proposition that due process requires the appointment of counsel to a defendant charged as a habitual offender in light of the complexity of the recidivism issue, particularly when the Immigration Judge has to make the decision based not only on one but rather on a second hypothetical. The split of the Circuits on an issue that is fundamental to the Citizens of the United States of America suggests that the U.S. Supreme Court should accept the Petition for Certiorari.

Further consideration on the issue of: "whether a second conviction for simple drug possession under state law is a felony under the CSA because it could have been prosecuted as a recidivist offense under 21 U.S.C. § 844(a),"

brings us to the words of Justice Marshall in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is." This Court in *Lopez v. Gonzales*, 549 U.S. 47 (2006) decided that a conviction in a state court for simple possession, regardless of whether it was a felony or not under state law, could not meet the criteria required to be a felony for purposes of the CSA under federal law; and that as such it was not a conviction that could be used as an aggravated felony. The clearly established law of *Lopez v. Gonzales* is "that a state offense constitutes a felony punishable under the Controlled Substances Act only if it proscribes conduct punishable as a felony under that federal law." [20] The Fifth Circuit has taken this decision as imposing the hypothetical felony theory.[21] The Fifth Circuit uses *Lopez* as a vehicle to eliminate constitutional requirements of the Fifth and Sixth Amendments by providing that an immigration judge can hypothetically try a respondent in removal proceedings without a jury trial, appointment of counsel, cross-examination of witnesses, and in general all due process requirements. All nations have a sovereign right to remove, expel, deny entry to

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[20] *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006).

[21] The hypothetical felony theory in summary establishes that if a state conviction can hypothetically be tried as a felony under federal law then it can become an aggravated felony for the purposes of the Immigration and Naturalization Act.

anyone they see fit to do so. All nations are required either by law or moral principle to establish and ordain some form of due process guarantee not just to its own citizens but to those of other nations. The United States has a moral duty owed to every person under its jurisdiction that can be traced back the words written by Thomas Jefferson in The Declaration of Independence in 1776; "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Furthermore, the United States memorialized the Declaration of Independence in a Constitution embodying the idea that no person shall be deprived of life, liberty, or property without due process of law.[22] It is immoral for any nation to remove or exclude an individual, even when it is a sovereign nation, without due process. However, for the United States to remove an individual without due process of law would be both immoral and unlawful. If an LPR is to be removed without due process of law, such act would be unconstitutional.

In *Alsol v. Mukasey*, 548 F.3d 207 (2nd Cir. 2008) the court states that:

> "[w]e now join the First, Third, and Sixth Circuits in holding that a second simple drug possession conviction is not an

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[22] U.S. CONST. amend. V

> 'aggravated felony' as that term is defined in 8 U.S.C. § 1101 (a)(43)(B). As noted, under Lopez, 'a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law.'... Lopez, however, does not stand for the proposition that a state offense is a felony under the CSA if it could have been charged as recidivist state offense that would then be punishable as a federal felony; rather, Lopez stands for the proposition that a state offense of conviction that is punishable as a federal felony is an aggravated felony."[23]

The second circuit is saying that in order for the person to be prosecuted under the CSA as an aggravated felon the second drug conviction in state court must have been prosecuted under the state recidivist statutes in order that such conviction might qualify to be treated as a felony under the CSA. It may be added that for due process of law to be had such recidivist statute might have to meet the requirements of the federal statute. The second circuit further states in *Alsol*, that:

> "the INA premises removability not on what an alien has done, or may have done, or is likely to do in the future

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[23] *Alsol v. Mukasey*, 548 F.3d 207, 214 (2nd Cir. 2008).

> (tempting as it may be to consider those factors), but on what he or she has been formally convicted of in court of law...The INA renders 'removable an alien who has been convicted of an aggravated felony, not one who has committed an aggravated felony.' The requirement that an alien be convicted of a removable offense before suffering the consequences under immigration law is precisely what *Lopez* requires. Under *Lopez*, an offense that could have been prosecuted-not necessarily resulting in conviction- as a recidivist offense is not an offense punishable as a federal felony. The INA and *Lopez* require an actual conviction for an offense that proscribes conduct that is punishable as a federal felony, not a conviction that could have been obtained if it had been prosecuted. See 8 U.S.C. § 1227 (a)(2)(A)(iii) (rendering deportable an alien who has been 'convicted of an aggravated felony'); 8 U.S.C. § 1229b (a)(3) (stating that the Attorney General may cancel removal if, inter alia, the alien 'has not been convicted of any aggravated felony')."[24]

If congress had intended for the statutes cited by the second circuit in ***Alsol*** to mean that an alien could or shall be deported for a hypothetical

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[24] *Alsol v. Mukasey*, 548 F.3d 207, 215 (2nd Cir. 2008).

felony then it would have so stated.[25] In *Bridges v. Wixon*, 326 U.S. 135 at 166 (1945) Justice Murphy, in his concurring opinion, thought that the Bill of Rights belongs to the aliens as well as to all citizens. Justice Murphy in *Bridges* further stated that "[c]ongress has ample power to protect the United States from internal revolution and anarchy without abandoning the ideals of freedom and tolerance."[26] Justice Murphy in the *Bridges* opinion also stated that:

> "[t]he First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws. By the same token, the First Amendment and other portions of the Bill of Rights make no exception in favor of deportation laws or laws enacted pursuant to a 'plenary' power of the government. Hence the very provisions of the Constitution negative the proposition that Congress, in the exercise of a

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[25] If congress had stated that hypothetical felonies could be the basis of removability, at least with regards to LPRs, such statute would probably be unconstitutional as it would stand in direct conflict with due process of law. Furthermore, if congress was to take such action, the Supreme Court would have a more difficult time finding that removability was civil in nature and it might have an easier time seeing that removability was a criminal proceeding under the guise of civil, which would require congress to be subject to the ex post facto limitation of the U.S. Constitution in deportation matters.

[26] *Bridges v. Wixon*, 326 U.S. 135, 165 (1945).

> 'plenary' power, may override the rights of those who are numbered among the beneficiaries of the Bill of Rights...Any other conclusion would make our constitutional safeguards transitory and discriminatory in nature."[27]

Thus, Congress cannot ignore the Constitution when enacting laws that govern immigration under the pretext of the enjoyment of 'plenary' power. The Supreme Court is not interpreting a statute in a way that would conflict with the Constitution. The Fifth Circuit therefore, should consider the Constitutional implications of its interpretation of the *Lopez* decision and reconsider the decision made in *Carachuri-Rosendo v. Holder*, as well as in the case of Cardona-Lopez. The Tex. Penal Code §§12.42(a)(1), 12.43(a) speak with regards to habitual offenders. The Texas Penal Code, under both sections cited, has some elementary principles of due process inherent in the statutory language. However, neither of these sections was used to convict Cardona-Lopez. In essence then it follows neither of Cardona-Lopez's convictions can properly be classified as a felony under 18 U.S.C. § 924 or 21 U.S.C. § 844, and much less as an aggravated felony in light of the requirements of 21 U.S.C. § 851 particularly when considering the definition given by 8 U.S.C. § 1101 (a)(43)(B).

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[27] *Bridges v. Wixon*, 326 U.S. 135, 162 (1945).

The BIA stated in *Matter of Carachuri-Rosendo*, 24 I &N Dec. 382 (BIA 2007) that after the wake of *Lopez v. Gonzales* 549 U.S. 47 (2006) the fifth circuit may want to revisit its prior holding in *Sanchez-Villalobos* to the effect that a prior state drug conviction can be used in enhancing a second drug offense to an aggravated felony even if the offenses are not in and of themselves Felony convictions under the CSA. As a matter of fact the Court in *United States v. Cepeda-Rios*, 530 F.3d 33 (5th Cir. 2008) reaffirmed the holding in *Sanchez-Villalobos*. However, *Lopez* demands a different result in the immigration context, as noted by the BIA in *Matter of Carachuri-Rosendo*, the immigration Judge should look at the permissible instruments to determine whether a particular state conviction can qualify as an aggravated felony. In so doing the question is not whether he could be convicted as an aggravated felon under the CSA but rather was the respondent actually convicted of an aggravated felony. In support of this proposition also see *Alsol v. Mukasey*, 548 F.3d 207 (2nd Cir. 2008) which in pertinent part states that "[i]n *Lopez v. Gonzales*... the Supreme Court held that a state drug offense is analogous to a 'felony punishable under the [CSA]' as required by § 924 (c)(2), 'only if it proscribes conduct punishable as a felony under that federal law."[28] The BIA again points in *Matter of Carachuri-*

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[28] *Alsol v. Mukasey*, 548 F.3d 207, 211 (2nd Cir. 2008).

Rosendo in Footnote 8 that "[a]liens in removal proceedings have no constitutional right to appointed counsel, so allowing facts about recidivism to be determined by an Immigration Judge in the first instance could raise due process concerns."[29] The BIA in *Matter of Carachuri-Rosendo* further cites *Chewing v. Cunningham*, 368 U.S. 443 (1962) for the proposition that due process requires the appointment of counsel to a defendant charged as an habitual offender in light of the complexity of the recidivism issue, particularly when the Immigration Judge has to make the decision based not only on one but rather on a second hypothetical. In this case Cardona-Lopez has been charged with two drug convictions both of which are misdemeanors under federal law. Hypothetically Cardona-Lopez may be prosecuted under the recidivism law as a felon. But this is precisely the type of effect that *Lopez* is trying to avoid. The Supreme Court is not saying that an Immigration Judge can become a criminal judge without allowing the respondent any due process rights. On the contrary the *Lopez* decision stands for the proposition that unless there is a conviction which can properly be analyzed under the categorical approach, no aggravated felony can be found, much less without due process. If the immigration Judge can impose the penalty of Removal; or deportation, for a hypothetical felony; the issue

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[29] *Matter of Carachuri-Rosendo*, 24 I &N Dec. 382, 394 (BIA 2007).

of cruel and unusual punishment under the U.S. CONST. amend. VIII is brought to light. The *Lopez* Court when considering the CSA has to be mindful of placing its meaning, whenever possible, within constitutional boundaries so as to avoid having to declare the statute unconstitutional. If the interpretation given to this statute by *Matter of Carachuri-Rosendo*, within the fifth circuit, was to stand, the Supreme Court would have to declare such statute unconstitutional. Such interpretation would make the Supreme Court a super legislature and would simply fly in the face of the Constitution. Rather, the Supreme Court in *Lopez* is saying that if the State had prosecuted the second drug conviction in a way that would be analogous to the federal recidivism law than such conviction may be used as an aggravated felony. The key here is that the States must have prosecuted the individual under its recidivist statutes. In this case Cardona-Lopez's prior conviction is not being used by the State and therefore none of the protections found under the notice requirements of 21 U.S.C. § 851 are present. The decisions in *Sanchez-Villalobos* and *Cepeda-Rios* are completely different from the present case. In such decisions due process rights of defendants are preserved. The judges determining the applicability of the aggravated felony concept in the sentencing enhancement context had proper jurisdiction. If this case was one of sentencing than I would agree with the BIA that fifth circuit precedent

dictates the second state conviction is an aggravated felony for enhancement under the guidelines. However, that is not the case, and even if it was, it is still questionable whether such determination would be found consistent with *Lopez*. Cardona-Lopez has not been convicted of an Aggravated felony. The BIA in *Matter of Carachuri-Rosendo* pointed out that:

> "all State prosecutions must correspond to the CSA's treatment of recidivism by providing the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper. *Oyler v. Boles*, 368 U.S. 448, 452-53 (1962). In our view, these minimal requirements governing findings of recidivism are part and parcel of what it means for a crime to be a 'recidivist' offense."[30]

Oyler v. Boles, 368 U.S. 448 (1962) stands for the proposition that due process requires notice. In *Oyler* the Court stated:

> "a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge even if due process does not require that notice be given prior to the trial on the substantive offense. Such requirements are implicit within our decisions in

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[30] *Matter of Carachuri-Rosendo*, 24 I &N Dec. 382, 391 (BIA 2007).

> Chewing v. Cunningham,...368 U.S. 443...; Reynolds v. Cochran, 365 U.S. 525...(1961); Chandler v. Fretag... Although these cases were specifically concerned with the right to assistance of counsel, it would have been an idle accomplishment to say that due process requires counsel but not the right to reasonable notice and opportunity to be heard."[31]

It would be equally futile to say that due process protections are present in any case except immigration proceedings. Aliens under the jurisdiction of the United States, and particularly LPRs, as recognized by *Landon v. Plasencia*, 459 U.S. 21 (1982), have due process rights. Cardona-Lopez was denied an opportunity to be heard and present evidence and testimony regarding his ties to the United States. Equally important, Cardona-Lopez was found guilty of an aggravated offense not because he was convicted of a felony or for committing a felony, but merely because he could have been prosecuted as a recidivist offender.[32] The Supreme Court should grant certiorari not only so that a conflict among the

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[31] *Oyler v. Boles*, 368 U.S. 448, 452 (1962).

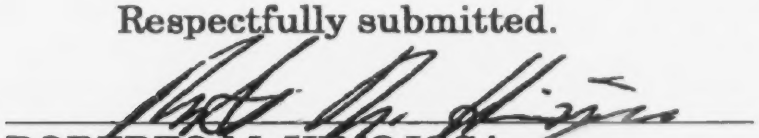
[32] Cardona-Lopez was not prosecuted as a recidivist offender under the State of Texas or Federal government. He was not found guilty as a recidivist offender. No due process of law was given to Cardona-Lopez. His removal is unconstitutional.

circuits can be clarified, but more fundamentally, because it is the U.S. Supreme Court's obligation under U.S. CONST. art. III §§1 and 2 to resolve cases "in Law and Equity, arising under this Constitution,..." The mandate of *Marbury v. Madison* to the effect that "[i]t is emphatically the province and duty of the judicial department to say what the law is..." must be given meaning in the context of the case of Cardona-Lopez by granting certiorari.

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted.



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October 31, 2009

APPENDICES

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Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 09-0418

{Seal of US Court of Appeals: Filed Aug 04 2009
CHARLES R. FULBRUGE III CLERK}

VICTOR HUGO CARDONA-LOPEZ, also known as Omar Torres-Sanchez, also known as Alejandro Marin Ruiz, also known as Victor Lopez,

Petitioner

v.

ERIC H. HOLDER, JR., U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the Board of Immigration Appeals

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Before
KING;STEWART,and
HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that petitioner's motion for stay of deportation pending case review is denied; and

IT IS FURTHER ORDERED that respondent's motion for summary affirmance is granted.

"s/" "s/" "s/"

Appendix B

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File:A047259146- Houston, TX Date: May 4 2009

In re: VICTOR HUGO CARDONA-LOPEZ aka. Omar Torres-Sanchez a.k.a Alejandro Marin Ruiz a.k.a. Victor H. Lopez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Roberto M. Hinojosa, Esquire

ON BEHALF OF DHS:
John W. McPhail
Assistant Chief Counsel

CHARGE:

Notice: Sec.237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227 (a)(2)(A)(iii)]-Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8

U.S.C. § 1227 (a)(2)(B)(i)]-
Convicted of controlled substance violation

APPLICATION: Cancellation of removal

The respondent has filed a timely appeal of an Immigration Judge's January 8,2009, decision, finding the respondent removable, as charged, and pretermitting the respondent's application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The respondent's appeal will be dismissed.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i) *(2008); Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). This Board reviews questions of law, discretion, and judgment in an Immigration Judge's decision *de novo. See* 8 C.F.R. § 1003. I(d)(3)(ii) (2008); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). Upon our *de novo* review, the respondent raises no arguments on appeal which would cause us to disturb the Immigration Judge's decision.

The respondent is a native and citizen of Mexico, and a lawful permanent resident of the

United States since July 1999. On June 27, 2007, the respondent was convicted upon a plea guilty, in the 339th District Court, Harris County, Texas, to a charge of unlawful possession of cocaine, less than one gram, and sentenced to 30 days confinement in the county jail. On September 29, 2008, the respondent was convicted upon a plea guilty, in the 339th District Court, Harris County, Texas, to a charge of unlawful possession of cocaine, less than one gram, resulting in the trial court's entry of an order deferring adjudication of his guilt and placing him on probation for a period of 2 years. *See* TEX. CRIM. PROC. CODE ANN. ART. 42.12 § 5 (Vernon 2006). The offense underlying this September 29,2008, conviction was committed on September 27,2008.

The Immigration Judge determined that the respondent's September 29, 2008, conviction for cocaine possession was an "aggravated felony" conviction under section 101 (a)(43)(B) of the Act, *8U.S.C.* § 1101(a)(43)(B), because it was predicated on an offense that was committed after his prior conviction for marijuana possession had become final, thereby qualifying it as a State-law counterpart to the Federal felony offense of "recidivist possession" defined at 21 U.S.C. § 844(a). *See Lopez v. Gonzales,* 127 S. Ct. 625, 630 n.6 (2006).

We find this appeal is controlled by our precedent decision in *Matter of Carachuri-Rosendo,* 24 I&N Dec. 382, 386-88 (BIA 2007), in which we determined that decisional authority

from the Supreme Court and the controlling Federal circuit court of appeals is determinative of whether a State drug offense constitutes an "aggravated felony" by virtue of its correspondence to the Federal felony offense of "recidivist possession." *Id* at 385-86. Relying on the alternate holding of the United States Court of Appeals for the Fifth Circuit, the jurisdiction wherein this case arises, in *United States v. Sanchez-Villalobos,* 412 F.3d 572, 576-77 (5th Cir. 2005), we also determined that an alien convicted under Texas law of simple possession of a controlled Substance, based on an offense committed after a prior Texas drug conviction became final, stood convicted of an aggravated felony in the Fifth Circuit. *Id* at 386-87.

The present record reflects that the respondent committed a cocaine possession offense on September 27, 2008, and was convicted for such offense on September 29, 2008. The record also shows that he had a prior Texas conviction for cocaine possession on June 27, 2007. There is no argument that under the applicable law of the Fifth Circuit and the State of Texas, the conviction for the respondent's 2007 Texas cocaine possession offense was "final" within the meaning of 21 U.S.C. § 844(a), when the Texas court entered its September 29, 2008, order, granting deferred adjudication as to the charged offense, and there is no indication in the record of conviction that they were ever appealed. *See Smith v. Gonzales,* 468 F.3d

272,277-78 (5th Cir. 2006) (holding that the "finality" of a prior conviction under 21 U.S.C. § 844(a) is determined by reference to the exhaustion of appeal rights). Moreover, to the extent the respondent argues that his 2007 and 2008 unlawful possession of cocaine convictions should not qualify as an aggravated felony because they were not prosecuted as recidivist offenses under Texas law, Fifth Circuit precedent does not impose any such requirement. *See Matter of Carachuri-Rosendo, supra,* at 387, 394; *see also United States v. Cepeda-Rios,* 530 F.3d 333 (5th Cir. 2008).

Consequently, we find that the respondent had a "prior conviction" for purposes of 21 U.S.C. § 844(a) once the Texas trial court accepted his plea of guilty on June 27, 2007, and sentenced him to a period of incarceration. *United States v. Cisneros, supra.* Moreover, under Texas law that "prior conviction" became "final" within the meaning of 21 U.S.C. §844(a) on either July27, 2007, when the 30-day appeal period specified by TEX. RULE APP. PROC. 26.2(a)(1) expired, or on August 20, 2007, when the 15-day period extension period specified by TEX. RULE APP. PROC. 26.3 expired. *Smith* v. *Gonzales, supra.* Either date is well in advance of September 27, 2008, the date when the respondent committed his second Texas cocaine possession offense.

Therefore, because the respondent had a final conviction for a drug, narcotic, or chemical offense on September 27, 2008, when he committed the cocaine possession offense for which he was convicted on September 29, *2008,* that cocaine possession offense was "considered a felony under federal law" within the meaning of *United States v. Sanchez-Villalobos, supra,* at 576. As such, it is an aggravated felony in these removal proceedings. *Matter of Carachuri-Rosendo, supra,*

The respondent bears the exclusive burden of proving all requisite facts pertinent to his eligibility for relief from removal. *See* 8 C.F.R. § 1240.8(d). Furthermore, where the evidence indicates that a ground for mandatory denial of an application for relief *may* apply, the alien has the burden of demonstrating by a preponderance of the evidence that such grounds do not apply. *Id.* As the record supports the Immigration Judge's determination that the respondent has been convicted of an aggravated felony, as defined in section 101(a)(43)(B) of the Act, the respondent is precluded from establishing his eligibility for either cancellation of removal pursuant to section 240A(a)(3) of the Act.

Consequently, we agree with the Immigration Judge that the respondent is removable, as charged, and ineligible for the requested relief from removal as an alien convicted of an

aggravated felony. *See Matter of Carachuri-Rosendo, supra.* Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

"s/"
FOR THE BOARD

Appendix C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

Houston, Texas

File A47259146 Date: January 8, 2009

In the Matter of

VICTOR HUGO CARDONA LOPEZ) In Removal
) Proceedings
Respondent)

CHARGE: Section 237 (a) (2) (A) (iii) of the Act, convicted of an aggravated felony; and Section 237 (a)(2)(B)(i) of the Act, convicted of a controlled substance violation

APPLICATION:

APPEARANCES:

ON BEHALF OF RESPONDENT:

Roberto M. Hinojosa, Esquire

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

James E. Manning, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 23-year-old male, native and citizen of Mexico. He is in removal proceedings pursuant to the Notice to Appear found at Exhibit #1. This document is dated October 1, 2008. On the Notice to Appear, Respondent is charged as stated above. The aggravated felony definition is the one found at Section 101 (a) (43) relating to drug trafficking.

The Respondent, through counsel, admits the allegations on the Notice to Appear, specifically that he is not a citizen of the United States. He was born in Mexico, became a permanent resident in July of 1999. Then on June 27, 2007, he was convicted in Harris County, Texas, for possession of cocaine, and later on, September 29, 2008, he was also convicted in Harris County, Texas, for possession of cocaine.

Respondent concedes that he is

subject to removal because he has been convicted of a controlled substance violation. He denies he's convicted of an aggravated felony, and the

Respondent argues with a brief in support and requests Cancellation of Removal, that the factual circumstances under which that he presents to the Court would not be an aggravated felony, based upon certain constitutional and due process rights
that would accrue to him if he was in federal court, and even a state court, that have not been scrupulously followed, this scenario. However, the Court interprets the case law in the Matter of Carachuri-Rosendo, United States v. Sanchez-Lobos, and United States v. cepeda-Rios, as simply stated that if the facts as presented here were presented to a federal court, Respondent could be sentenced to confinement as a felon for a recidivist controlled substance violation under the Controlled Substance Act. That is all that the Fifth Circuit looks for. It does not look toward whether or not Respondent was charged under the recidivist statute. And the court in the state of Texas charged him as being a recidivist. The Fifth Circuit simply states that under these facts he could be sentenced to confinement for more than a year if in a federal criminal proceedings. This presumption is that the U.S. District Attorney would get it right.

The Court inquired of Respondent if he was

seeking relief from removal other than cancellation of removal, which the Court finds he's essentially ineligible for, and he indicated that that was the only potential relief available to him. In absence of any viable forms of relief that he could prosecute before the Court, the Court must order his deportation from the United States.

Before ordering the Respondent removed from the United States, the Court should also indicate that the Respondent's first conviction for a controlled substance violation was on June 27, 2007, for an offense committed on June 25, 2007, for which there's no evidence that an appeal was taken, or ever made. His second conviction was based upon a crime committed on September 27, 2008, and this would be a commission of a crime after his first conviction had become final. This is also a requirement under the recidivist statute of the Controlled Substance Act. The following is the Order of the Court.

ORDER

IT IS HEREBY ORDERED that Respondent be removed from the united States to Mexico on the charged contained on the Notice to Appear, Exhibit 1.

"s/"
JIMMIE LEE BENTON
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before Jimmie Lee Benton, in the matter of: VICTOR HUGO CARDONA-LOPEZ
A 47 259 146
Houston, Texas
was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

"s/"
Barbara Neff, Transcriber

YORK STENOGRAPHIC SERVICES, INC. 34 North George Street York, Pennsylvania 17401-1266
(717) 854-0077

February 27, 2009

Completion Date

bjn/ccb

Appendix D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. I § 8 :"Congress shall have power to....establish an uniform Rule of Naturalization, a uniform Laws on the subject of bankruptcies throughout the United States;..."

U.S. CONST. art. III § 1: "The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish...."

U.S. CONST. art. III § 2: "The judicial Power shall extended to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;..."

U.S. CONST. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,...nor be deprived of life, liberty, or property, without due process of law..."

U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to

a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ...to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence."

U.S. CONST. amend. VII: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. XIV: "All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside...; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

8 U.S.C. § 1101 (a)(43)(B): " The term "aggravated felony" means-... illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substance Act), including a drug trafficking crime (as defined in section 924 (c) of title 18, United States Code);..."

8 U.S.C. § 1227 (a)(2)(A)(iii): "Any alien who is convicted of an aggravated felony at any time after admission is deportable."

8 U.S.C. § 1229b (a)(3): " The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien-... has not been convicted of any aggravated felony."

18 U.S.C. § 924(c)(2): " For purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.),..."

21 U.S.C. § 844(a): "Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be

sentenced to a term of imprisonment for not less than 125 days but not more than 2 years,..."

21 U.S.C. § 851(a)(1): "No person who stands convicted of an offense under this part shall be sentence to increase punishment by reason of one or more prior convictions, unless before trial, or before entry of plea of guilty, the United States attorney files and information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."

21 U.S.C. § 851 (b): "[T]he Court shall after conviction but before pronouncement of sentence inquire of the person...whether he affirms or denies that he has been previously convicted..."

21 U.S.C. § 851 (c)(1): "If the person denies any allegation of the information of prior conviction, or claims any conviction alleged is invalid, he shall file a written response to the information... The court shall hold a hearing...the United States shall have the burden of proof beyond reasonable doubt on any issue of fact."

21 U.S.C. § 851 (c)(2): "A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the

factual basis therefore, with particularity in his response to the information...."

28 U.S.C. §2101 (c): Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

28 U.S.C. §1254 (1): "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:...By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Tex. Pen. Code § 12.42 (a) (1): "If it is shown on trial of a state jail felony punishable under Section 12.35 (a) that the defendant has previously been finally convicted of two state jail felonies, on conviction the defendant shall be punished for a third degree felony."

Tex. Pen. Code § 12.43(a): "If it is shown on the trial of a Class A misdemeanor that the defendant has been before convicted of a Class A

misdemeanor or any degree of felony, on conviction he shall be punished by:..."

Tex. Crim. Proc. Code art. 42.12 § 5: "...Except as provided by subsection (d) of this section, when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty...hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision...."

Supreme Court, U.S.
FILED
JAN 4 - 2010
OFFICE OF THE CLERK

No. 09-539

In the Supreme Court of the United States

VICTOR HUGO CARDONA-LOPEZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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TONY WEST
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QUESTION PRESENTED

Whether a second or subsequent state conviction for possession of a controlled substance automatically qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B), or instead qualifies only if the State applied a recidivist enhancement in that second or subsequent conviction.

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In the Supreme Court of the United States

No. 09-539

VICTOR HUGO CARDONA-LOPEZ, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The decisions of the court of appeals (Pet. App. 2a-3a), the Board of Immigration Appeals (Pet. App. 4a-10a), and the immigration judge (Pet. App. 11a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2009. The petition for a writ of certiorari was filed on October 31, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who has "been convicted of a violation of * * * any law * * * of a State * * * relating to a controlled substance" is removable.

8 U.S.C. 1227(a)(2)(B)(i). Although certain aliens may seek discretionary cancellation of removal under 8 U.S.C. 1229b(a), an alien who has been convicted of an "aggravated felony" is ineligible for such relief. 8 U.S.C. 1229b(a)(3). The INA defines an "aggravated felony" by reference to a list of categories of qualifying criminal offenses. As relevant here, the list includes "illicit trafficking in a controlled substance * * *, including a drug trafficking crime (as defined in section 924(c) of title 18)," 8 U.S.C. 1101(a)(43)(B), whether the offense was "in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (penultimate sentence). In turn, 18 U.S.C. 924(c)(2) defines a "drug trafficking crime" as, *inter alia*, "any felony punishable under the Controlled Substances Act [(CSA)] (21 U.S.C. 801 et seq.)."

One provision of the CSA, 21 U.S.C. 844(a), makes it "unlawful for any person knowingly or intentionally to possess a controlled substance" without a prescription. Although in most circumstances a defendant is subject to imprisonment for "not more than 1 year" for his first possession conviction under Section 844, "if [the defendant] commits such offense after a prior conviction under [Chapter 13 of Title 21] * * *, or a prior conviction for any drug * * * offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for * * * not more than 2 years." *Ibid.*[1] The longer term of imprisonment for a second or subsequent conviction cannot, however, be imposed on a defendant unless certain procedural steps

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[1] Some first possession offenses are subject to a felony sentence. See 21 U.S.C. 844(a) (first possession of more than five grams of substance containing cocaine base subject to five-year minimum sentence; first possession of flunitrazepam subject to imprisonment for up to three years).

have been followed. Section 851 of Title 21 provides that "[n]o person who stands convicted of an offense under [the CSA] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court * * * stating in writing the previous convictions to be relied upon," and the defendant is afforded an opportunity to challenge the validity of the prior conviction in a hearing before the court. 21 U.S.C. 851(a) and (c).

2. a. Petitioner is a native and citizen of Mexico who has been a lawful permanent resident of the United States since 1999. Pet. App. 5a-6a. In June 2007, petitioner was convicted in Texas state court of possession of less than one ounce of cocaine, a state jail felony, and was sentenced to 30 days in jail. *Id.* at 6a; Administrative Record (A.R.) 109-110.[2] In September 2008, petitioner was again convicted in Texas state court of a drug possession offense. Pet. App. 6a; A.R. 101-102. Petitioner pleaded guilty to possession of less than one ounce of cocaine, and the trial court entered an order deferring adjudication of his guilt and placing him on probation for two years. *Ibid.*[3] Although Texas has re-

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[2] See Tex. Health & Safety Code § 481.115(a) and (b) (Vernon 2003) (possession of less than one gram of a Penalty Group 1 substance is a state jail felony); *id.* § 481.102(3)(D) (listing cocaine in Penalty Group 1); see also Tex. Penal Code § 12.35 (Vernon 2003 & Supp. 2009) (state jail felony generally punishable by 180 days to two years of imprisonment); *id.* § 12.44(a) (state jail felony may be punished as a misdemeanor if, "after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice").

[3] Deferred adjudication under Texas state law is a "conviction" for purposes of 8 U.S.C. 1227(a)(2)(B)(i) and 1229b(a)(3). See, *e.g.*,

cidivist enhancement statutes applicable to some subsequent state jail felony convictions, no enhancement was available for petitioner's second conviction. See Tex. Penal Code §§ 12.35(c)(2), 12.42(a) (Vernon 2003 & Supp. 2009).

b. In October 2008, petitioner was charged with being removable under 8 U.S.C. 1227(a)(2)(B)(i), for having been convicted of an offense relating to a controlled substance, and 8 U.S.C. 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony. Pet. App. 11a-12a. The charging document cited both of his cocaine possession convictions. A.R. 135.

At a hearing before an immigration judge (IJ), petitioner conceded that he was removable because he had been convicted of a controlled substance offense, but denied that he was removable on the ground that his second conviction was an aggravated felony. Pet. App. 12a-13a. Petitioner sought cancellation of removal under 8 U.S.C. 1229b(a). Pet. App. 13a; A.R. 85. The IJ found petitioner removable as charged and also found him ineligible for cancellation of removal because he had been convicted of an aggravated felony based on his two state drug possession offenses. Pet. App. 13a-14a.

The Board of Immigration Appeals (Board) dismissed petitioner's administrative appeal. Pet. App. 4a-10a. The Board agreed with the IJ that a state possession conviction, occurring after a similar prior conviction

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Madriz-Alvarado v. *Ashcroft*, 383 F.3d 321, 330 (5th Cir. 2004); see also 8 U.S.C. 1101(a)(48)(A) (defining "conviction" to include the situation in which "adjudication of guilt has been withheld," if "a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt," and "the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed").

had become final, qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(B) because it is punishable as a felony under the CSA, 21 U.S.C. 844(a). Pet. App. 6a-9a.[4]

3. Petitioner then sought judicial review. The government filed a motion for summary affirmance, arguing that the Fifth Circuit's prior decision in *Carachuri-Rosendo* v. *Holder*, 570 F.3d 263 (2009), cert. granted, No. 09-60 (Dec. 14, 2009), controlled this case. Mot. for Summ. Affirmance 6-9. In a per curiam order, the court of appeals granted the government's unopposed motion and summarily affirmed the Board's decision. Pet. App. 2a-3a.

DISCUSSION

Petitioner seeks review (Pet. 5-39) of the court of appeals' determination that his second conviction under Texas law for drug possession qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B). On December 14, 2009, this Court granted certiorari in *Carachuri-Rosendo* v. *Holder*, No. 09-60, which presents the same question. Accordingly, this Court should hold the petition for a writ of certiorari in this case pending its decision in *Carachuri-Rosendo*, and then dispose of this case accordingly.[5]

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[4] The Board also held that petitioner's first conviction was final at the time he committed his second offense. Pet. App. 7a-9a. Petitioner does not renew any challenge to the finality of his convictions before this Court.

[5] Petitioner suggests in passing (Pet. 7-8, 10-12, 14-17, 19-22, 23-25, 35-36, 37-38) that treating a second or successive drug possession conviction as an aggravated felony would violate various provisions of the Constitution. But petitioner did not present any such arguments to the court of appeals, and the court of appeals did not pass on those arguments. (In his petition for review to the court of appeals, petitioner

CONCLUSION

The Court should hold the petition for a writ of certiorari in this case pending its decision in *Carachuri-Rosendo* v. *Holder*, cert. granted, No. 09-60 (Dec. 14, 2009), and then dispose of this case accordingly.

Respectfully submitted.

ELENA KAGAN
Solicitor General
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Assistant Attorney General
DONALD E. KEENER
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Attorneys

JANUARY 2010

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referred to several constitutional provisions, stating that constitutional arguments "will need to be developed further under an appropriate brief," Pet. for Review and Mot. for Stay of Removal 1, but he never developed those arguments.) Under these circumstances, petitioner has waived any constitutional challenge to the treatment of his second possession offense as an aggravated felony. In any event, petitioner's suggestion that the Constitution prohibits treating his second possession offense as an aggravated felony is without merit.

(3)

No. 09-539

Supreme Court, U.S.
FILED
FEB 26 2010
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IN THE SUPREME COURT OF THE UNITED STATES

VICTOR HUGO CARDONA-LOPEZ,
Petitioner,
v.
ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY

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Counsel for Petitioner

PETITIONER'S REPLY

In the "Brief for the Respondent", the Government suggest that this court hold the petition for a writ of certiorari in this case pending its decision in *Carachuri-Rosendo*. (Brief Res. 5). This is a mere suggestion upon the Court. Another alternative at the Court's discretion would be for the Court to Grant the petition for a writ of certiorari and hear this case along with the *Carachuri-Rosendo*. The Court has different options at its discretion. However, the Government also states that Petitioner suggested in passing that "treating a second or successive drug possession conviction as an aggravated felony would violate various provisions of the Constitution". (Brief Res. 5-6). Petitioner's argument is that treating a second or successive State drug possession conviction as an aggravated felony without providing the protections afforded by Federal law would violate various Constitutional provisions, among others the Fifth and Sixth amendments. But this is not an in passing argument. The argument was raised for the very first time before the Immigration Judge at the Removal hearing. As

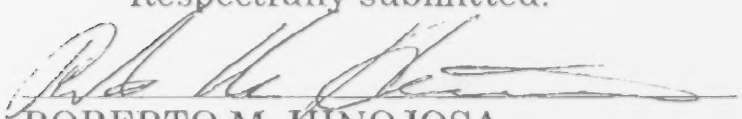
pointed out by the Immigration Judge in his Removal Order. (Pet. App. 12a-14a). The BIA did not state that such Constitutional arguments were not raised before that Court. (Pet. App. 4a-10a). The arguments of Constitutional dimensions were made. Neither the Immigration Judge nor the Board of Immigration Appeals in general consider Constitutional arguments. Such arguments were nonetheless raised. The government itself concedes that in the petition for review presented before the Court of Appeals, by Petitioner, several constitutional provisions were raised. (Brief Res. 5-6). It is absolutely meritless to say that because the Fifth Circuit decided to Grant the Government's Motion for Summary Affirmance Petitioner waives his Constitutional arguments. The Respondent further says that the Government's motion for summary affirmance, which was granted by the Fifth Circuit, was unopposed. (Brief Res. 5). While it is true that Petitioner did not file a reply to the Government's Motion for summary affirmance, such fact does not mean that the motion was unopposed. If the motion was to have been unopposed such fact would have probably been reflected in the title of the motion. Furthermore, the Respondent refers to a Petition and a Motion that were filed before the Fifth Circuit which, as far as counsel for petitioner

knows, have not been introduced before this Court for consideration. The Respondent further argues that the Constitutional arguments raised by Petitioner are without merit. (Brief Res. 5-6). Petitioner's Constitutional arguments are meritorious and in the minds of everyone interested in what the Founding Fathers established as a guide for the future of this Country. The argument of Respondent defeats itself in that it demonstrates that petitioner did not waive his Constitutional concerns. The Government concedes that Petitioner raises the Constitutional issues before the Fifth Circuit and the record reflects that the constitutional issues were even raised before the Immigration Judge. Furthermore, if the Government wants to argue before the Court that Petitioner waived his constitutional rights because it raised them before the Fifth Circuit but then did not follow through it must, at the very least, present the actual documents it purports to establish the facts as they argue them. Petitioner has presented legitimate constitutional issues before this Court. The record does not reflect that Petitioner waived the Constitutional issues it has argued since the hearing before the Immigration Judge. The Fifth Circuit decided to grant the governments Motion for Summary Affirmance but that fact in and of itself does not

support the government's position. The fact that the government presents no authority to support its belief that the Constitutional issues raised by Petitioner are without merit is an indication that the Governments' argument is at best weak.

In light of the inability of the Government to present any authority in support of its arguments it is clear that the Constitutional issues made by Petitioner are with merit and should be considered. Petitioner suggests that this honorable Court consider all arguments raised and that the Petition for a Writ of Certiorari be granted.

Respectfully submitted.



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February 25, 2010